

1 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 **COMMONWEALTH OF THE NORTHERN) CRIMINAL ACTION NO. 06-0038 B**
9 **MARIANA ISLANDS,)**

10 **Plaintiff,**)

11 **vs.**)

12 **ANICETO T. OGUMORO,**)

13 **Defendant.**)

ORDER GRANTING DEFENDANT
ANICETO T. OGUMORO'S MOTION
TO SUPPRESS EVIDENCE

14 **INTRODUCTION**

15 On March 16, 2006, Aniceto T. Ogumoro (hereinafter "Defendant"), through counsel,
16 Viola Alepuyo and Joseph James Norita Camacho, moved this Court to order suppression of all
17 evidence seized by government agents while executing a search warrant at Defendant's
18 residence on February 10, 2006. The motion was brought pursuant to the provisions of Rule
19 12(b)(3), N.M.I. Rules of Criminal Procedure, Article I, Section 3 of the N.M.I. Constitution,
20 the Fourth Amendment to the United States Constitution, and the holding in *Franks v.*
21 *Delaware*, 438 U.S. 154 (1978).

22 Beginning on March 28, 2006, the Court heard arguments on the motion. Viola
23 Apeluyo and Stephanie Flores appeared on behalf of Aniceto Ogumoro; Assistant Attorney
24 General Kristin St. Peter appeared on behalf of the Government. The Government opposed the
25 motion. Having heard all arguments and considered all submissions by counsel, the Court
26 hereby grants the Motion to Suppress Evidence. Evidence obtained at Defendant's residence
27 under the guise of the invalid search warrant is inadmissible.
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1 **STANDARD**

2 The right of the people of the Commonwealth to be free from unreasonable search and
3 seizure is firmly grounded in the Commonwealth Constitution. *Commonwealth v. Aldan*, 1997
4 MP 31 ¶ 9. No warrant shall be issued unless probable cause is supported by oath or
5 affirmation and “particularly describ[es] the place to be searched and the persons or things to be
6 seized.” N.M.I. Const., Art. I, § 3(a) (2004). Probable cause exists when “there is a fair
7 probability that contraband or evidence of a crime will be found in a particular place.” *Illinois*
8 *v. Gates*, 462 U.S. 213, 238 (1983). A person aggrieved by an unlawful search (*i.e.* a search
9 warrant based on insufficient probable cause) may make a motion in court to suppress the
10 unlawfully obtained evidence. 6 CMC § 6204. Upon such motion, the Court shall review any
11 facts necessary to the decision of the motion. *Id.* If the motion is granted, the evidence may not
12 be used as evidence at any hearing or trial. *Id.*

13 **DISCUSSION**

14 Defendant seeks to suppress evidence obtained during an investigation claiming the
15 search warrant was unlawful because it lacked probable cause. The Commonwealth opposes
16 this motion, basing its contention on three facts that would have supported the magistrate
17 finding probable cause: (1) The search warrant yielded illegal weapons from the same
18 compound where Defendant lives; (2) Commonwealth Customs officers have records that
19 Defendant was the intended recipient of an illegal ammunition shipment in 1998; and (3) In
20 early 2000, Defendant was present when high-powered weapons were displayed.

21 In determining whether the search warrant was valid, the Court will not take into
22 consideration the weapons recovered under the guise of the search warrant. To do so would
23 justify a search warrant based on the “fruit of a poisonous tree.” Therefore, the Court must
24 consider whether the facts, as presented within the four corners of the affidavit, support a
25 finding of probable cause as required by Article I, Section 3 of the Commonwealth Constitution
26 and the Fourth Amendment to the United States Constitution.

1 **I. *Franks* Hearing**

2 Defendant relied on *Franks v. Delaware*, 438 U.S. 154 (1978) to challenge the facts in
3 Detective Guerrero’s affidavit. In *Franks*, the defendant sought to challenge the truthfulness of
4 certain factual statements made in the police affidavit supporting a warrant to search his
5 apartment, and sought to call witnesses to prove the misstatements. The trial court prohibited
6 Franks from challenging the officer’s sworn statement, and consequently, the evidence admitted
7 at trial lead to a conviction.

8 The Supreme Court overruled, holding the defendant has a Fourth Amendment right to
9 challenge the truthfulness of factual statements made in an affidavit to support a warrant under
10 certain limited circumstances. “Where the defendant makes a substantial preliminary showing
11 that a false statement knowingly and intentionally, or with reckless disregard for the truth, was
12 included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary
13 to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth
14 Amendment, requires that a hearing be held at the defendant’s request.” *Franks*, 438 U.S. at
15 155. Likewise, the Fourth Amendment is incorporated into Article I, Section 10 of the
16 Commonwealth Constitution, providing an individual has a right to privacy, which “shall not be
17 infringed except upon a showing of compelling interest.” N.M.I. Const. Art. I, § 10; *see also*
18 *Aldan*, 31 MP at ¶ 9. It is under the Commonwealth Constitution that this Court evaluates the
19 existence of probable cause.

20 It is well established that a defendant challenging the veracity of statements that form the
21 basis of a warrant bears a heavy burden. *United States v. Ursery*, 109 F.3d 1129, 1132 (6th Cir.
22 1997). To succeed in a *Franks* Hearing, the defendant must show: “(1) that facts were omitted
23 with the intent to make, or in reckless disregard of whether they make, the affidavit misleading,
24 and (2) that the affidavit, if supplemented by the omitted information, could not support a
25 finding of probable cause.” *United States v. Box*, 193 F.3d 1032, 1034-35 (8th Cir. 1999)
26 (quoting *United States v. Humphreys*, 982 F.2d 254, 259 n.2 (8th Cir. 1992)). In light of these
27 factors, the warrant may be shown to be invalid by a preponderance of evidence. *United States*
28 *v. Richardson*, 943 F.2d 547, 548 (5th Cir. 1991).

1 In this case, Defendant met the threshold requirement by casting sufficient doubt on the
2 value of the evidence presented within the four corners of the affidavit. Specifically, Defendant
3 highlighted the following: (1) of the five paragraphs in the affidavit that mention Defendant,
4 paragraphs 10, 12, and 13 are legal and non-incriminating; (2) material facts were omitted from
5 the affidavit concerning the 1998 Customs Case (CS98-02) due to an unreasonable investigation;
6 and (3) the display of guns in early 2000 has not been corroborated by other family members
7 present, nor has the reporting family member's credibility been established. In addition, the
8 passage of time renders the latter two incidents stale and insufficient to support a finding of
9 probable cause.

10 In the absence of significant facts and corroboration derived from a diligent investigation,
11 whether intentionally or unintentionally omitted, the finding of probable cause within the four
12 corners of the affidavit is too attenuated and the search warrant is therefore invalid.

13 14 **II. False Search Warrant Due to Lack of Probable Cause**

15 A false search warrant is one that misleads the magistrate into believing the existence of
16 certain facts which enter into his thought process when evaluating probable cause." *State v.*
17 *Groff*, 323 N.W. 2d 204, 210 (1982). Although information forming the basis of a search
18 warrant is not required to be entirely accurate (*Thomas v. State*, 173 Ga.App. 481, 484 (1985)
19 (citing *United States v. Leon*, 468 U.S. 897 (1984) (held probable cause or substantial basis to
20 believe facts in affidavit justifies reliance on truthfulness in regard to an informant.)), the
21 validity of the warrant must be assessed on the basis of the information officers disclosed, or
22 had a duty to discover and to disclose, to the issuing magistrate. *Maryland v. Garrison*, 480
23 U.S. 79, 85 (1987).

24 This Court extends this standard to the exclusion of significant information bearing on
25 probable cause, particularly exculpatory facts and adverse information. *State v. Beaty*, 118
26 Idaho 20 (1990) (deliberate withholding of exculpatory information from the magistrate
27 constituted reckless disregard for truth and a substantial probability existed that had omitted
28 information been given to the magistrate, it would have altered the magistrate's finding of
probable cause); *see also People v. Windrum*, 128 Misc.2d 1043 (1985) (motion to suppress

1 evidence granted because officer failed to disclose that informant gave contradictory
2 statements).

3 As is evidenced by facts brought to light at the hearing, and in consideration of the facts
4 as they are presented within the four corners of the affidavit, affiant failed to exercise due
5 diligence in his investigation and carelessly omitted material facts that would have altered the
6 magistrate's finding of probable cause. Specifically, affiant's careless investigation resulted in
7 the omission of materials facts in paragraphs 9 and 7 of the affidavit, reliance on stale evidence,
8 and failure to establish the family member's credibility or reliability. Had the issuing
9 magistrate disregarded the stale evidence and questioned the reliability of the informant,
10 nothing in the affidavit would support a finding of probable cause.

11 **A. Paragraphs 10, 12, and 13 Do Not Support Probable Cause**

12 Three of the five paragraphs in the affidavit contain facts that are neither incriminating
13 nor illegal. In summary, they state Defendant is a police captain, who resides on the Ogumoro
14 family compound, and has a container behind his residence. Even when considering the totality
15 of the circumstances, none of these three paragraphs substantiates probable cause that criminal
16 activity is afoot.

17 The container behind Defendant's residence is neither illegal nor incriminating evidence
18 supporting probable cause. According to the affidavit, "[A]n assessment was conducted of the
19 Ogumoro family compound where by a container was seen to be located behind the residence of
20 Mr. Aniceto T. Ogumoro in Capitol Hill amongst other discoveries." (Guerrero Aff. ¶ 10).
21 However, the family compound reportedly has three such containers dispersed around the
22 compound. No facts are provided to support a reasonable suspicion that the container found
23 behind Defendant's residence is the same container seized eight years ago in 1998 (discussed
24 below). A corresponding container number or physical description, both of which were
25 accessible to the detective, would have substantiated a reasonable suspicion. Yet, such details
26 were either intentionally omitted to create an inference or carelessly omitted during the
27 investigation process. Regardless, this fact alone is not illegal or suspicious and the Court
28 refuses to consider it when determining probable cause.

Nor is there anything illegal about the facts mentioned in paragraphs 12. "[B]oth
Ambrosio Ogumoro and his brother Aniceto T. Ogumoro reside at the Ogumoro family property

1 compound in Capitol Hill.” (Guerrero Aff. ¶ 12). Living amongst family members is not
2 illegal, nor does it implicate criminal activity. On the contrary, it is part of the culture of living
3 on family owned lands.

4 Lastly, Defendant’s position within the DPS does not support probable cause. In fact, it
5 should have highlighted the absence of implicating evidence. Paragraph 13 reads: “That Mr.
6 Aniceto T. Ogumoro is currently employed by the Department of Public Safety as a Police
7 Captain and is serving as the Acting Director of Police.” (Guerrero Aff. ¶ 13). Defendant’s
8 position as Police Captain and Acting Director of Police inexplicitly requires more substantiated
9 facts to support probable cause. However, no such facts are provided by the affiant, and thus,
10 this fact does not substantiate a finding of probable cause.

11 **B. Paragraph 9 - The 1998 Customs Case CS02-98**

12 In light of the circumstances, the seizure of the 1998 shipment is too uncertain and stale
13 to support a finding of probable cause. Although Customs Case CS98-02 case is eight years old,
14 the lapse of time is least important when the suspected criminal activity is continuing in nature
15 and when the property is not likely to be destroyed or dissipated. *United States v. Horn*, 187
16 F.3d 781, 786 (8th Cir. 1999). “[I]nformation four months old, or even three years old, may
17 supply probable cause for a warrant to search the home of someone suspected of illegal
18 possession of a firearm, because possession is a continuing offense and because firearm
19 enthusiasts tend to keep their weapons for long periods of time.” *Id.* at 786. (citing *United*
20 *States v. Maxim*, 55 F.3d 394, 397 (8th Cir. 1995), cert. denied, 516 U.S. 903, 116 S.Ct. 265, 133
21 L.Ed.2d 188 (1995) (lapse of time was minimized because defendant was a convicted felon, a
22 special agent swore under oath that gun enthusiasts keep weapons for long periods of time, and
23 conformation that defendant was in possession of illegal firearms four months prior to execution
24 of warrant.)

25 However, unlike the defendant in *Maxim*, Defendant is not a convicted felon, nor is there
26 any indication that he recently engaged in illegal activity. Quite the contrary, he was Captain of
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1 the Police when the warrant was executed and aside from the facts presented in the affidavit,
2 there is no indication he has violated the law during his tenure.

3 There is no bright-line test for determining when information is stale. Staleness cannot
4 be determined solely by counting days on a calendar. *United States v. Spikes*, 158 F.3d 913, 923
5 (6th Cir. 1998). Rather, time factors must be examined in the context of a specific case and the
6 nature of the crime under investigation. *United States v. McNeil*, 184 F.3d 770, 775 (8th Cir.
7 1999); *see also United States v. Harris*, 369 F.3d 1157, 1165 (10th Cir. 2004). Other courts have
8 classified information as too stale to establish probable cause based on the nature of the criminal
9 activity, the length of the activity, and the nature of the property to be seized. *Harris*, 369 F.3d
10 at 1165; *Spikes*, 158 F.3d at 923; *United States v. Williams*, 124 F.3d 411, 420 (3d Cir. 1997);
11 *United States v. Schaefer*, 87 F.3d 562, 568 (1st Cir. 1996); *United States v. LaMorie*, 100 F.3d
12 547, 554 (8th Cir. 1996).

13 In this case, too much significant information is omitted from the affidavit to ignore the
14 lapse of time. There is no indication whether charges were filed in the past eight years in
15 connection with the seized shipment. Surely, the Attorney General's Office would have
16 investigated and pressed charges within the past eight years if the contents seized in 1998 were
17 illegal. There are simply no facts to support the assumption the shipment was illegal or intended
18 for illegal purposes.

19 Had the affidavit addressed whether an investigation was conducted or concluded,
20 whether the shipment was determined to be illegal, whether charges were filed or dropped, or
21 whether the shipment was intended for personal or DPS use, there likely would have been
22 sufficient facts supporting probable cause. With little more, too much is left to the imagination
23 of the magistrate and too little is provided to support a finding of probable cause.

24 25 **C. Paragraph 7 – The Display of Guns in Early 2000**

26 The same line of reasoning can be applied to the family member's observation of
27 Defendant's presence in early 2000 when officer Ambrosio Ogumoro displayed numerous guns
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1 on a table. The affidavit states, “Ambrosio’s brother Aniceto T. Ogumoro [Defendant] was
2 present at the time when [the] firearms were displayed.” (Guerrero Aff. ¶ 7).

3 According to the family member, on the table were displayed “(about 6) Uzis, (about 3
4 12 gauge) shotguns, (several) M-16 machineguns” and “a lot of handguns.” (Guerrero Aff. ¶ 7).
5 However, the affidavit does not state that Defendant was in contact with the guns or responsible
6 for the guns. The affidavit also does not mention if other family members were present, if the
7 information was corroborated by another source, or if the family member is a credible and
8 reliable informant.

9 In *Illinois v. Gates*, the Supreme Court abandoned its earlier two prong Aguilar-Spinelli
10 test for assessing an informant’s reliability and reaffirmed the totality of the circumstances
11 analysis that was traditionally used to determine probable cause. *Gates*, 462 U.S. at 238-39. In
12 examining the totality of the circumstances, courts have considered the following factors: (1)
13 first-hand observation by the informant; (2) degree of detail provided; (3) corroboration of the
14 informant’s information by an officer’s independent investigation; and (4) the fact that the
15 informant testified at the probable cause hearing.” *United States v. Reddrick*, 90 F.3d 1276, 1280
16 (7th Cir. 1996). Thus, hearsay may be the basis of the affidavit if the magistrate is provided with
17 some of the underlying circumstances indicating the statements are reliable. *Corey v.*
18 *Commonwealth*, 8 Va. App 281, 288 (1989); *see also United States v. DeQuasie*, 373 F.3d 509
19 (4th Cir. 2004).

20 It is necessary to consider all the circumstances set forth in the affidavit, including the
21 veracity and basis of knowledge of persons supplying hearsay information. *Id.* The magistrate
22 must be informed of some underlying circumstances from which the informant can be deemed
23 reliable. It cannot be presumed the magistrate was informed of significant facts prior to signing
24 the affidavit in the absence of such an assertion. Therefore, this Court is limited to the facts as
25 they are presented within the four corners of the affidavit.

26 In this case, the informant was not established as a reliable or credible witness. Although
27 the family member had a first-hand observation of the guns displayed in early 2000, the evidence
28 was not corroborated with any other family member or witness. In addition, neither the affiant

1 nor the affidavit personified the family member. For example, to determine credibility or
2 veracity, the magistrate may wish to consider the age, mental capacity, or the family member's
3 involvement in the gun display. Yet, the affidavit is simply void of credible characteristics,
4 corroborating evidence, or indications that the family member is reliable.

5 In light of these circumstances, the early 2000 display of guns is too stale to support a
6 finding of probable cause. Defendant's position within the DPS cannot be overlooked in
7 consideration of the lapse of time and lack of significant information supporting probable cause.
8 Rather, in the absence of incriminating facts, it is reasonable to assume that Defendant was
9 lawfully in the presence of DPS weapons.

10 More importantly, the affidavit fails to establish a significant nexus between Ambrosio
11 Ogomoro's questionable conduct and that of the Defendant. Even if Defendant was present
12 when the guns were displayed in early 2000, simply being present does not create reasonable
13 suspicion. As such, when considering the totality of the circumstances, a personal observation is
14 insufficient without credibility or corroboration to support the finding of probable cause.

15 16 **D. Affiant Failed to Conduct a Diligent Investigation**

17 The basis of finding probable cause must appear on the face of the affidavit. *Giordenello*
18 *v. United States*, 357 US 480, 487 (1958). The probable cause standard does not "require
19 officials to possess an airtight case before taking action. Rather, the pieces of the puzzle of an
20 investigation puzzle will often fail to neatly fit, and officers must be given leeway to draw
21 *reasonable* [emphasis added] conclusions from confusing and contradictory information...."
22 *DeQuasie*, 373 F.3d at 518-19 (quoting *Taylor v. Farmer*, 13 F.3d 117, 121 (4th Cir. 1993)). So,
23 while an affidavit supporting a search warrant should not be read in a grudging or technical
24 manner, it should not require the magistrate or a reviewing court to use imagination to supply
25 essential details critical to determining probable cause. *United States v. Karathanos*, 531 F.2d
26 26, 31 (C.A.2. N.Y. 1976).

27 A law enforcement officer must act on what he knows, or should know, in the exercise
28 of due diligence. *United States v. Leon*, 468 U.S. 897, 914 (1984). To not hold an officer to

1 this standard and permit the omission of material facts would defeat the entire purpose of the
2 warrant procedure. *United States v. Broward*, 594 F2d 345, 351 (1979) (to condone the
3 insertion of a material fact that would negate probable cause would defeat the whole point of
4 the procedure and allow the judicial officer to make an independent assessment of the existence
5 of probable cause.)

6 The facts presented in the affidavit fail to establish a sufficient nexus between Ambrosio
7 Ogumoro's alleged illegal conduct and that of Defendant. During the hearing, Defendant
8 successfully highlighted affiant's failure to exercise due diligence during his investigation. This
9 lack of diligence is reflected in a superficial investigation and scant evidence concerning the
10 Defendant's involvement in the possession of illegal firearms.

11 First, the affiant failed to comprehensively access DPS firearms logbooks and ensure
12 Defendant was not lawfully in possession of firearms. According to the affiant's testimony, he
13 feared he would be denied access to department logbooks, and thus did not attempt to do so.
14 This is simply not an adequate answer. Had the affiant accessed the logbooks, he would have
15 known what firearms were issued to Defendant, and whether it was reasonable to believe
16 Defendant was unlawfully in possession of firearms. Failing to take such basic investigative
17 steps casts serious doubt on the reasonableness of affiant's belief that Defendant was involved
18 in unlawful conduct. It indicates a careless investigation process.

19 Second, affiant did not adequately investigate Customs Case CS98-02. When asked if
20 he believed the ammunition seized in 1998 would be found at Defendant's residence, the affiant
21 answered yes. The Court finds this belief to be unreasonable given the inadequate investigation
22 conducted by the affiant. He did not question Customs about the contents of the container,
23 whether Customs had disposed of the seized contents, where the container was currently
24 located, or whether it had a distinguishing color, number, or shipping company inscription. Nor
25 did he contact the Attorney General's Office to inquire about an investigation of CS980-2 or to
26 establish whether charges were filed. Affiant further testified that conducting such an
27 investigation would have been relatively easy. However, having failed to do so, significant
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1 facts were omitted that would have supported or negated the magistrate’s finding of probable
2 cause.

3 Affiant also failed to correlate evidence and substantiate a reasonable belief that the
4 ammunition was located at Defendant’s residence. Affiant testified that Custom’s records listed
5 the seized cargo container’s number, yet he did not make record of the container’s number. In
6 fact, the affiant does not mention the container’s physical attributes or serial numbers to support
7 an inference that Defendant was in possession of the ammunition. As such, the affidavit is void
8 of correlating evidence.

9 Lastly, it was brought to the Court’s attention during the hearing that the affiant did not
10 visit the compound before submitting the affidavit or executing the warrant. However, affiant
11 asserts a reasonable belief that there is a “high probability” the ammunition and firearms are
12 stored at Defendant’s residence where co-Defendant (Ambrosio Ogumoro) “frequently visits.”
13 (Guerrero Aff. at 4). Although the brothers live on the same compound, this fact alone is
14 simply insufficient to support such a suspicion.

15 The Court finds that the lack of information in the affidavit is not due entirely to
16 intentional omissions, but rather the result of a poorly conducted investigation that haphazardly
17 portrays facts too weak to support a finding of probable cause. It is suggested that DPS re-
18 evaluate the tools and skills detectives utilize in conducting an investigation and preparing
19 affidavits. In addition to improving investigation techniques and procedures, the Attorney
20 General’s Office should be consulted to guide detectives in substantiating probable cause before
21 submitting an affidavit to a magistrate. By consulting the Attorney General’s Office, DPS is
22 ensuring all the dots are sufficiently connected.

23 24 **III. Conclusion**

25 This Court interprets Article I, Section 3 of the N.M.I. Constitution as setting a higher
26 standard than the Fourth Amendment. As such, the evidence supporting probable cause within
27 the four corners of the affidavit, and presented at the hearing, was examined under the
28 Commonwealth Constitution. Properly preparing and executing a search warrant from its

1 conception protects the people of the Commonwealth from unlawful searches and seizures, and
2 upholds their right to privacy.

3 An individual's rights are protected when the government takes prudent steps in
4 obtaining a search warrant. In turn, the search warrant is less likely to be deemed invalid.
5 Ensuring the validity of a warrant before execution will aid DPS in efficiency and support its
6 quest to stop crime. Further, taking such prudent steps from an investigation's conception will
7 assist the Attorney General's Office in successfully prosecuting crime. Most importantly,
8 improving investigation techniques, procedures, and affidavit preparation is the best method of
9 protecting individual rights against unreasonable searches and seizures, and their right to
10 privacy.

11
12 **CONCLUSION**

13 For the foregoing reasons, Defendant's Motion to Suppress Evidence is hereby
14 GRANTED.

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16 **IT SO ORDERED** this 17th day of April 2006.

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18
19 /s/ _____
20 KENNETH L. GOVENDO,
21 Associate Judge
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